IN THE HIGH COURT OF DELHI AT NEW DELHI

CM(M) No.1896/2006

R.N.Sharma ..... Petitioner
! through: Mr.K.B.Rohtagi, Ms.Aparna Rohtagi, Mr.S.K.Dhingra and Mr.Mahesh Kasana, Advocates

VERSUS

$ Mrs.Mukesh Goel ..... Respondent
^ through: Mr.Ravi Gupta and Mr.Ankit Jain, Advocates

RESERVED ON : 02-04-2007

% **D**ATE OF DECISION: 17-04-2007

CORAM:
* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J.

1. Petitioner was the defendant in the original suit. The respondent was the plaintiff. I shall be referring to the parties as the plaintiff and the defendant.

2. Case of the plaintiff was that he was the owner of rear portion of the first floor of property bearing No.14, Satya Niketan, New Delhi. That plaintiff purchased the property from

the erstwhile owner M/s.Delta Construction by means of an agreement to sell dated 30.10.1996. That as per clause 17 of the said agreement, plaintiff was allowed to place a board/hoarding on half of the front wall starting from the side staircase up to the middle of the wall. Remaining half of the front wall was to be used by the owner of the front portion of the first floor. That plaintiff was running a computer centre from the rear half flat of the first floor. She had displayed her hoarding/board on the front wall as per the right vested in her under the agreement to sell. That in the 3rd week of March 1999, defendant purchased the property and on 18.4.1999 asked the plaintiff to remove the board/hoarding displayed by the plaintiff on the front wall. That the plaintiff lodged a complaint with the police informing that the defendant was illegally trying to remove her board. That on 26.4.1999 when husband of the plaintiff and her son went to the property they found that the defendant had removed their board and had installed his board on the entire front wall. So alleging, decree for mandatory injunction was prayed for in favour of the plaintiff and against the defendant praying that defendant be directed to remove his board from half portion of the front wall. Along with the plaint, an application under Order 39 Rule 1 & 2

CPC was filed praying for grant of an interim mandatory injunction.

3. Defendant contested the suit stating that the front portion of the first floor was purchased by him. In his agreement to sell there was no reference that his entitlement to use outer portion of the front wall of the first floor was restricted. That, being the owner of the front portion of the first floor outer wall of the first floor on the front side was his property and that he was entitled to use the same in any manner he wished.

4. In view of the fact that plaintiff and defendant were claiming a right under agreement to sell in their favour, learned Trial Judge considered the language of the 2 agreements to sell relied upon and held in favour of the plaintiff. Vide order dated 1.9.2001 learned Trial Judge directed defendant to remove his board from half portion of the front wall towards the staircase side and permitted plaintiff to install his board.

5. Defendant filed an appeal against the order passed by the learned Trial Judge. Vide order dated 5.11.2001, the Appellate Court concurred with the view taken by the Trial Judge.

6. Same issue has been re-agitated before me.

7. Before adverting to the admitted facts it would be relevant to pen down that the instant petition invokes a remedy under Article 227 of the Constitution of India. Defendant would thus have to show that the Trial Court and the First Appellate Court have either failed to exercise jurisdiction vested in law or have exercised jurisdiction in law with material irregularity causing injustice to the petitioner. It would be impermissible for the defendant to question the 2 decisions on facts by attempting to show that the decisions are wrong. Under Article 227 of the Constitution of India I cannot decide the issue with respect to the correctness or otherwise of the impugned decisions by reappreciating the factual matrix, save and except if it is shown that a material document has been ignored.

8. Secondly, the principle of mandatory ad interim injunction need to be noted. As against the normal rule of interim injunction, that it is intended to secure status quo being maintained, the rule of a mandatory ad-interim injunction is to restore the parties to the same position in which they were immediately prior to the doing of the wrongful act alleged. In other words, a mandatory ad-interim injunction restores status quo ante. The difference in the 2 kinds of interim injunctions is that a mandatory ad interim injunction would require a stronger

prima facie case to be shown as also to be established that the act of the defendant which altered the status was a wrongful act. Additionally it has to be shown that the said wrongful act has violated a legal right of the plaintiff and if not restored would cause irreparable loss and injury to the plaintiff.

9. It is not in dispute that both parties claim right from the same recorded owner. It is also not in dispute that both parties claim a right under agreements to sell.

10. Whereas plaintiff claims a direct right under the original owner, namely, M/s.Delta Construction. Defendant claims a right through one Sanjay Batra, who in turn purchased front half of the first floor from M/s.Delta Constrcution.

11. Thus, in all 3 agreements to sell have to be seen.

12. Agreement to sell in favour of the plaintiff is dated 30.10.1996. Clause 17 of the said agreement to sell is relevant. It reads as under:-

> "17. The half of the front wall starting from staircase side of the said flat shall belong to second party for placing board/hoarding etc. (The remaining half portion of the said wall shall belong to the owner of front portion of the first floor of the said flat for placing boards/hoarding etc.)."

13. Sanjay Batra, predecessor-in-interest of the defendant purchased the front half of the first floor under an agreement to sell dated 9.9.1996. Clause 17 of the said

agreement to sell in his favour executed by M/s.Delta Constructions reads as under:-

> "17. The half of the front wall of the said portion shall belong to the purchaser for placing board/hoarding etc. (half of the front wall starting from staircase side shall belong to the owner of rear portion of the first floor).

14. Defendant purchased front half of the first floor from Sanjay Batra vide agreement to sell dated _ March 1999. Clause 15 of the said agreement to sell recorded as under:-

> "15. That the front wall of the said portion shall belong to the purchaser for placing board/hoarding etc."

15. View taken by the Courts below is that Sanjay Batra could not have sold or transferred a right more than what was vested in him. View taken is that while selling front half of the first floor to Sanjay Batra M/s Delta Constructions clearly limited his right to use only half of the front wall for placing a board/hoarding, clearly recording that the remaining half towards the staircase side shall belong to the owner of the rear portion of the first floor. Thus, a prima facie view has been taken that defendant could not claim right to use the entire front wall (outer portion) by virtue of clause 15 of his agreement to sell executed by Sanjay Batra in his favour.

16. It is settled law that a person cannot create a right in favour of a third party more than what he had. Thus, Sanjay

Batra could not have created a right, title or an interest in favour of the defendant which exceeded his right, title or interest in the front wall of the first floor in question.

17. It would be relevant to note that not only did the registered owner create a right in favour of the plaintiff to display a board/hoarding on half portion of the front wall but while selling the front half portion of the first floor to Sanjay Batra clearly incorporated the said transfer of right in favour of the plaintiff. In other words, while selling the front half first floor to Sanjay Batra, in respect of the right to display a hoarding on the front wall, it was clearly mentioned that Sanjay Batra would have right to use only half the wall.

18. Defendant being an assignee of the right from Sanjay Batra could not and cannot claim a right more than what was transferred by the owner to Sanjay Batra.

19. Thus, the view taken by the Courts below pertaining to the rights of the plaintiff and the defendant is correct.

20. A submission was made by Shri K.B.Rohtagi, learned counsel for the defendant that by virtue of Section 11 of the Transfer of Property Act 1882, the restriction on the right of Sanjay Batra was unenforceable. Contention urged was that since front half of the first floor was sold to Sanjay Batra and

rear half of the flat was sold to the plaintiff, plaintiff had no concern with the front half of the flat and Sanjay Batra had full right on the front portion of the first floor. This was an absolute right which could not be curtailed by a restrictive covenant.

21. Section 11 of the Transfer of Property Act 1882 reads as under:-

> "**11. Restriction repugnant to interest created.-** Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.
>
> Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

22. Prima facie, Section 11 of the Transfer of Property Act 1882 is attracted where an instrument creates an absolute interest on transfer but terms of the transfer direct such interest to be applied or enjoyed in a particular manner. Only then would the restriction be held to be invalid save insofar it is saved by the proviso to the section. Prima facie, Section 11 would not be attracted where there is no absolute transfer of

an interest in a property.

23. A perusal of clause 17 of the agreement to sell between M/s.Delta Constructions and Sanjay Batra shows that the owner transferred only a limited right to Sanjay Batra in respect of the front wall of the first floor, in that, transfered a right in favour of Sanjay Batra to display a board only on half of the front wall, clearly recording that the right to display a board on the remaining half wall would be that of the owner of the rear portion of the flat. Thus, prima facie, defendant cannot place reliance upon Section 11 of the Transfer of Property Act 1882.

24. On the issue whether mandatory ad interim injunction was rightly or wrongly granted, suffice would it be to note that case of the plaintiff was that ever since she had purchased the rear portion of the flat, she had displayed her board on the front half wall towards the staircase side. She asserted that the defendant invaded the said right after he purchased the front portion of the first floor from Sanjay Batra. She categorically pleaded that the offending act of the defendant, i.e. removing her sign board took place on the night preceding 26.4.1999.

25. Learned First Appellate Court has noted the decision

of the Supreme Court reported as AIR 1990 SC 867, *Dorab Cawasji Warden vs. Coomi Sorab Warden & Ors.* as to when a mandatory ad interim injunction can be granted.

26. I find that the learned Courts below have correctly understood the law as declared by the Supreme Court. The Courts below have culled out the relevant and necessary facts to be taken cognizance of for deciding the application for interim relief.

27. I find neither an infirmity nor perversity in the approach of the Courts below. I find no perversity in the orders impugned. I do not find it to be a case of improper exercise of jurisdiction, much less with material irregularity, much less a case of injustice to the defendant.

28. The petition is dismissed.

29. Costs to follow.

April 17, 2007 (PRADEEP NANDRAJOG)
dk JUDGE